

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed  
Adoption of Department of Human  
Service Rules Governing Mental  
Health Services Eligible for  
Medical Assistance Payment,  
Minnesota Rules, Parts 9505.0260  
and 9505.0323

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Wednesday, April 5, 1989 on the Fifth Floor of the Space Center Building, 444 Lafayette Road, St. Paul, Minnesota. This Report is part of a rule hearing proceeding, held pursuant to Minn. Stat.

14,131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those originally proposed.

Deborah Huskins, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Department of Human Services (DHS). The following Department employees appeared and testified in support of the proposed rules: Assistant Commissioner Barbara Kaufman; Thomas Malueg, Medical Director; Ron Hook, Health Legal Specialist; Sara Hunter, Residential Program Consultant; Robert Meyer, Assistant Director-Developmental Disabilities; David Paulson, Residential Program Consultant; Karen Thorkelson, Residential Program Consultants and Eleanor Weber, Assistant Director-Rules and Bulletins Division. The hearing continued until all interested groups and persons had had an opportunity to testify concerning the adoption of the proposed rules.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner of the Department of Human Services makes changes in the rule other than those recommended in this report, she must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibit; and written comments, the

Administrative Law Judge makes the following

## FINDINGS OF FACT

### Procedural Requirements

1. On February 15, 1989, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A fiscal note.

2. On Monday, March 6, 1989, a Notice of Hearing and a copy of the proposed rules were published at 13 State Register pp. 2141-2152.

3. On March 1, 1989, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On March 9, 1989, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) An Affidavit of Additional Notice.
- (e) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (f) A copy of the State Register containing the proposed rules.
- (g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 12 State Register p. 513 (September 21, 1987) and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through April 25, 1989. The hearing record closed on April 28, 1989, at the end of the third business day following the close of the comment period.

### Statutor, Authority

6 Statutory authority to promulgate the proposed rules is found at

Minn. Stat. 256B.04, subds. 2 and 4: and 256B.0625 subds 3 and 24  
(1988)

.2.

#### Fiscal Note

7. The Department of Human Services estimates that in the two years following the adoption of these proposed rules, a net increase in cost per year will result in the amount of \$214,375.00. Of that amount, the State's share is 42.24 percent or \$90,552.00; and the counties' share is 4.69 percent or \$10,054.00. The federal government will assume the remaining 53.07 percent of the increased costs.

#### Nature of the Proposed Rules

8. Amendments to Minn. Rules pt. 9505.0175 and new Rules pts. 9505.0260 and 9505.0323 are proposed by the Department of Human Services to establish standards for providers of mental health services, including community mental health center services in the Medical Assistance program, to receive public assistance payments for those services. The Minnesota Department of Human Services is designated as the State agency to supervise the administration of the State's Medical Assistance program and to adopt rules to implement the State plan. The State plan is the Department's comprehensive written plan to administer the Medical Assistance (MA) program in compliance with federal requirements. The program provides for the medical needs of low income or disabled persons and families with dependent children. These proposed rules specifically address reimbursement for mental health services provided by mental health professionals as defined in the rules.

9. Many of the proposed rule provisions received no negative public comment and were adequately supported by the Statement of Need and Reasonableness. The Judge will not specifically address those rules in the discussion below and finds that the need for and reasonableness of those provisions has been demonstrated. However, many comments were received concerning the proposed rules which suggested various changes to the language proposed. The modifications to the proposed rules set forth in Finding 11 reflect the Department's consideration of many of the concerns raised. The Judge will primarily discuss below specific issues concerning the need for, reasonableness of, or statutory authority for the proposed rules.

10. At the commencement of the hearing, the Department proposed the following modifications to Rules pts. 9505.0260 and 9505.0323:

11. In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. *Broen Memorial Home v. Minnesota Department of*

Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may either be adjudicative facts or legislative facts. Manufactured Housing Institute v. Petterson, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246. If this burden is met, it is not the function of the Judge to redraft the proposed rules based upon arguments that a better rule would result if a different approach was used.

9505.0260, Subp. 4.

. . . licensed consulting psychiatrist psychologist . . .

9505.0323, Sub. 1.T.

. . . objectives are relieving subjective distress. alleviating

9505.0325, Subp. 15.

. . . block must not consist of none any

9505.0325, Subp. 16.H.

. . . hour daily each unless the Client's individual treatment plan prescribes more than one hour daily.

9505.0325, Subp. 15 and Subp. 16.H.

insert "therapy" after "socialization" and after "skills".

9505.0325, Subp. 27, P. - R.

P. psychological testing, diagnostic assessment, explanation of findings,  
and psychotherapy if the services are provided by  
a school or a local education

unless the school or local education Agency is a  
provider and the services are, medically necessary and prescribed in a  
child's individual education plan;

Q. psychological testing.,diagnostic explanation  
of findings  
and psychotherapy if the Services are provided by an entity whose  
purpose  
is not health service related such As the division of vocational  
rehabilitation of the department of Jobs and training;

-et R. fundraising activities; and

. community planning.

In addition, the first sentence in Subp. 27 is changed to  
read, in  
items A to are not

The above-modifications are essentially clerical and clarifying in  
nature. The Judge finds that the need for and reasonableness of these  
modifications has been demonstrated by the Department and that none  
constitute  
a substantial change from the rules as initially proposed.

Modifications Made to the Proposed Rules Subsequent to the Hearing

11 After a review of the testimony given at the hearing and all  
written



comments submitted, the Department has proposed the following modifications to the proposed rules:

9505.0260, Subp. 1.C.

For purposes of this part, "mental health professional" means, a "mental health professional" as defined in part 9505.0260, subpart ZB and a person on the roster of the State Board of Mental Health and Developmental Disabilities, or a person licensed under the provisions of the Mental Health Law, who is employed by a provider of community mental health center services.

9505-0260, Subp. 2.

Delete item K. and make grammatical changes to reflect the deletion.

9505.0260, Subp. 5.

. . . in part 9505-0323, subpart 4\*-Z7, are not

9505-0323, Subp. I.D.(1)

. . . of the time in a five working day period during which . . .

9505-0323, Subp. I.E@

I . . . reduce or relieve the effects of mental illness and provide training to enable . . .

9505.0323, Subp. I.I., and Subp. 12.

I. "Group psychotherapy" means psychotherapy conducted by a mental health professional for more than three but not more than eight persons or psychotherapy conducted by two mental health professionals for at least nine but not more than twelve persons who because of the nature of their emotional, (Remainder without change.)

Subp. 12. Payment limitation; total payment for group psychotherapy. To be eligible for medical assistance payment, a group psychotherapy session conducted by one mental health professional shall not have more than eight persons, and a person who is employed by a provider of community mental health services shall have at least ten persons. @ -bLtt-R-ot move thar twelve ter;op5.

These limits thati Apply regardless of the4o the-  
pArtiCipaRt5' eligibility  
for medical assistance. Medical assistance payment for each client who  
participates in a session of group therapy shall be one quarter of the  
hourly payment rate for an hour of individual psychotherapy  
except that in  
the case of 1 group psychotherapy session conducted by two mental  
health  
professional, medical assistance payment shall be according to the  
number  
of participants attending the session. When 0 client participates in  
a  
session of group psychotherapy conducted by two mental health  
professionals, the client's record must document that the notheidpy ii  
medically necessary.

9505.0323, Subp. I.V.

Add:

V@. "-",MLi I ti-pi e f Am i ly arQvD @psychotberagy" me an a  
psychotherapy 45 spvqi f i ed  
in subpart Z8.

and

lubl. ZB. Multiple family grQup,,5ycbotherapy. A mvltitle-family  
group  
psychotherapy session shall be eligible for metinal t55i@t-a-n-ce  
@)aym@nt if  
tte anyohgtherapy action in tentgne4 for at lea5t ttree jut not more  
thin  
f i ye- fam i l- i es @ M"-! @@ I a@15 tance- payment. f Qr@ @ mu I t  
i\_p !\_e fam i !\_y- group  
5ball be limited to one session vf,up to two hours per week for a  
period  
of no more than ten weeks.

and grammatical changes to reflect the addition of new item "V".

9505-0323, Subp. I.J.

J. "Hour" means a 60-minute session of a mental health service other  
than  
a diagnostic assessment. At least 45 minutes of the  
period must be 5sept in face-to-face contact with the client. The  
other  
15 minutes may be spent in @d-4-r@ client-related activities. @c-4 @  
Example5 are scheduling, maintaining clinical records, consulting with  
others about the client's mental health status, preparing reports,  
receiving the clinical supervision Qirelty related to the client's  
p5yQbQtherapy session, and revising the client's individual treatment  
plan. If the period of service is longer or shorter than one hour, up  
to  
efle-s@t4 one-fourth of the time may be spent in +n4Aoeet-client-  
related  
activities.

9505.0323, Subp. 4.G.

I . . carried out by a mental health professional -&r@@ef4a4-@a4@  
pfaetlt+oree in a..... professionals, wpaa@ 4ea4-t@ or  
other . . .

9505.0323, Subp. 13.

. . .the client's temporary-absence . . .

9505.0323, Subp. 7.

Add:

C. The recipient experienced a significant change in behavior or living arrangement and the recipient meets the criteria in itemn A ind P and add "or the criteria in item C." to the fir7t paragraph (I nhhpait

9505-0323, Subp. 15.

. . .The toe de4 program mutt be a v a i l at le at  
least . . .

9505.0323, Subp. 16-I.

. . .and eating that it Rot Medi,ally supervised and included in the  
CIA;nt'5 iddivilual treatm;nt ylar as necessary apd appropriate.

9505-0323, Subp. 15.

Add:

RQtwtib5tanOing the dQcumentAtion of each strytce required under  
of "s@r a m Dt may be provided on a daily  
5\*51, by V5t gf@a cbeqkjitt of Ayallawle therapies in whic4 the client  
partivikatrd and on , weekly basis by a summary of the information  
required vpder subpart Z6.

9505-0323, Subp. 18.

After the word "assessment", add:

The,mentAl health prDfessi,nAl providing the explanation Df findings  
may use the time available under this subpart for an explanation of  
findings  
in units of one-half or one-hour Out the total must not exceed the  
amount  
specified in this subpart.

9505-0323, Subps. 19-20.

Subp. 19.

@ . . assistance payment, in the case of a client who is an adult, a .  
. .

. . .must ask a recipients or the recipient's legal representatives on

. . .If the recipient, or the recipient's legal representatives ef-tbe-  
pennon-speeffied-lo-sebyant Zt- . . .

Add a new last paragraph to read:

For p4ppo5e, of avbpart5 19 and 20, "legal representative" Means a  
guar4lln Qr\_,Qo,yrvatQr authorized by the court to make decisions about  
laryt;es for a per5Qn@ or other individual autQQrizQd to consent to  
services for the person.

Subp. 20.

. . .assistance payment, in the case of a client oh, iv d third, i  
mental . . .



. . . child's parent or legal representative; - @ -ftr+maf-y-c at el4  
vef -w i  
wh om +b t- chl it +o -4 i vl my- u n l e s s a . . .

. . . Authorization by the child's parent or legal representatives 4o  
p+4mf-y -c--a@iven- i s not requ i red i f :

A. The parent or legal representatives @ #r@a@ @eeg+vef-w44h-shem-  
hindering or impeding . . .

9505.0323, Subp. 21.

. . . recipient's record Aa!4talRed-by-t4e  
poo\*ldial-tbe must be . . .

9505-0323, Subp. 24.

. . . licensure or board Certification as a . . .

9505.0323.

Add a new subpart 29 to read:

Subp. 29. Required participation of psychiatrist in treatment of  
person  
with \$er!Qo5 and persistent mental illness. A psychiatrist must  
participate in the diagno5itc assessment, formulation of an individual  
treatment plan, and monitoring of the clinical progress of a client  
having  
a mental illness that meets the definition of serious and persistent  
mental illness under part 9505.0477, subpart 27. The extent of the  
psychiatrist's participation shall be according to the individual  
clinical  
needs of the client at mutually determined by the mental health  
professional who is Qondoctipg the assessment and the psychiatrist who  
participates. At a minimum, the psychiatri5t's participation must  
cDn5i5t  
of timely reviews of the activities specified in this subpart and verbal  
interaction between the psychiatrist and the mental health professional.

9505-0323.

Add a new subpart 30 to read:

lu4g,,3Q. Group Piy;hoth,TAPy for crisis intervention. Group  
ptylhgtherapy prqvied to ; client on'; daily basis for the purpose of  
cr!5i, interventiqp 15 eligitle for Melical assistance payment ks  
specified in items A to Q:

A. The group psychotherapy is necessary to Meet the client's crisis.

B. At least 3 but not more than 9 persons, regardless of their medical  
assistance eligibility, participate in the crisis group.

C, For each crisis episode, the client may ieceiue up to th,-, hnui@ pet  
week within a period of two calendav wee!5 unlens piiui allth qi-iti,n

i5

obtained for additional hours pet weep.





D, The number of hours of group psychotherapy provided for the purposes of Crisis intervention shall be included, within the limit specified in subpart 1Q unless prior authorization is obtained.

Crisis is defined for the purpose of this subpart as any Acute social, interpersonal, environmental, or Intrapersonal stress which threatens the client's current level of adjustment or causes significant subjective distress.

Add to the end of 9505.0323, Subp. 1.N: and Subpart 30.

Lastly, the Department proposes to adopt an effective date of January 1, 1990 for Parts 9505.0260 and 9505.0323.

The above-modifications are based on oral and written comments from the public. The Judge finds that the need for and reasonableness of those modifications has been demonstrated by the Department. None constitute a substantial change from the rules as initially proposed.

#### Discussion of the Proposed Rules

12. Part 9505.0323, Subp. 1.T. -- This provision defines the term "psychotherapy" as a "health service for the face-to-face treatment of a client or clients with mental illness through the psychological, psychiatric, or interpersonal method most appropriate to the needs of the client and in conformity with prevailing community standards of mental health practice. The Minnesota Association for Retarded Citizens (ARC) and the Legal Advocacy for Persons with Developmental Disabilities (LAPDD) both assert that this definition is aimed at people with mental illness who have the ability to communicate verbally. Both contend that the rule definition is discriminatory in violation of both federal and state law. LAPDD argues that the rule will result in people with mental retardation as well as mental illness having no ongoing, regular service available to them.

The Department states that the proposed definition of psychotherapy makes necessary distinctions which recognize that persons with developmental disabilities and severe behavior problems are recipients of other longterm care services funded under the Medical Assistance program. These other services are provided pursuant to different rules than those being considered herein and alternate funding mechanisms. Additionally, persons with developmental disabilities and severe behavior disorders will be entitled to diagnostic assessment, explanation of findings, and family therapy as provided in the proposed rules. The Department contends that the "extra" services that LAPDD and ARC are asking for should not be duplicated in this proposed rule as they are usually provided for under other MA programs.

There is not a sufficient factual basis in this record for the Judge to be

able to make a "summary judgment" decision regarding the discriminative effect of the proposed rule. The Department has articulated a sufficient lot of "no" to support the need for and reasonableness of the proposed rule and the judge so finds. This issue will have to be dealt with by DHS, LAPDD and AR, on a case-by-case basis.

13. Part 9505.0323 subds., 4 5@ 6 and 7 -- These subparts establish criteria to limit and extend the length of time to complete a diagnostic assessment for a person with mental illness. Subpart 4 specifically limits MA reimbursement to two hours per assessment unless the conditions set forth in subparts 5 and 6 can be shown. Subpart 5 specifically provides for up to eight hours of diagnostic assessment reimbursement if the recipient (client or person with mental illness) has other diagnosable conditions which would make the assessment more difficult. The Department has attempted to include other conditions which would typically require more time for assessment.

The Minnesota Mental Health Law Project (Project) asserts that because subpart 5 permits an extension of time to complete the diagnostic assessment only if the person is mentally ill and developmentally disabled, hearing or speech impaired or a child exhibiting specific behavior disorders, it discriminates against the difficult-to-assess mentally ill person who is not possessed of one of the additional conditions.

The Department states that the rule was written to provide for extensions of time to perform diagnostic assessments only if factors were present which would require such extensions. Absent those factors, DHS argues that the two-hour limitation should be sufficient time to complete a diagnostic assessment. DHS asserts that these provisions are necessary to comply with Minn. Stat. 256B.04, subd. 2 which requires that the MA program be carried out in an effective and economical manner.

The Judge finds that the Department has demonstrated the need for and reasonableness of the "diagnostic assessment" provisions and that they are not, on their face, discriminatory. The Department has made subjective decisions, which have a rational basis, to limit or extend the time permitted for the reimbursement of diagnostic assessment of recipients. Although this rule may prove to be inequitable in one or more cases of persons with more severe mental illness, those must be dealt with on a case-by-case basis rather than by rewriting the rule to accommodate a yet undefined situation.

14. Part 9505.0323 -- Several psychiatrists commented that a separate "medical management" code should be incorporated into the proposed rule for the reimbursement of doctors for the supervision of multi-disciplinary teams, medication management and psychotherapy. The Department agrees with the commenters that the medical care of psychiatric patients is a legitimate medical service that is distinct from psychotherapy. However, the issue of appropriate reimbursement codes for the services provided by various mental health professionals including psychiatrists is outside of the purview of these

proposed rules. The Judge agrees and concludes that it would be inappropriate to consider the addition of new reimbursement codes as part of this rulemaking proceeding.

15. Part 9505.0323, "Prior Authorization" provisions -- Several providers commented that receiving prior authorization for additional services and/or reimbursement is a very time consuming process, sometimes taking up to three months. Dr. Eric W. Laison, adult psychiatrist at the University of Illinois at Chicago, stated that "these delays can be detrimental to patients who not only suffer, during

these delays but also are at risk for suicide." Additionally, the commenters question the qualifications of Department staff to give prior authorizations to mental health professionals.

The Department states that only professionals with the same qualifications as the "requesting" professional are assigned to evaluate the merits of prior authorization requests. However, the Department has not responded to the issue of timeliness for prior authorizations or suggested any rule modification to alleviate the concern. Neither these proposed rules nor any other rule that the Judge is aware of prescribes a defined time limit for the Department to respond to prior authorization requests.

Obviously, depending upon what prior authorization is being requested for, the timeliness of the response may or may not be critical. There is nothing in the record in this proceeding to support the reasonableness of time limits for DHS' response to any of the areas where prior authorizations may be requested. Consequently, there is no factual basis to impose either a blanket, or specific limit for each type of request submitted. The Judge does not find that the rule is unreasonable absent specific time limits for the response to prior authorization requests. However, this is an issue which may be critical to the satisfactory treatment of a recipient and thus require timely action by DHS.

16. Part 9505.0323 subp. 14.B. -- This rule provision prohibits Medical Assistance payments for a "partial hospitalization program" unless that program is provided more than 14 days after the recipient is discharged as an inpatient with a diagnosis of mental illness. Many commenters objected strongly to this mandated 14-day "break" between inpatient services and partial hospitalization. The Minnesota Psychiatric Society states that "requiring a 14-day hiatus between inpatient and outpatient status to qualify for partial hospitalization benefits is an obscure and clinically unwise differentiation. . . . Distinctions such as this fragment and artificially divide viable and potentially useful clinical functions." Dr. F. O. Anderson states that, "In practice, it is common to refer an inpatient who is partially recovered to a partial hospital program for completion of the recovery period in a less expensive fashion. This is naturally necessary if we are to reduce inpatient lengths of stay below 30 days, since most of the medications presently used to affect brain function take 30 days to work . . . . A two-week period 'in limbo' could be harmful for many patients."

The Department states that, "Requiring 14 days to elapse between a client's discharge from a hospital and the beginning of the client's partial hospitalization is a reasonable means of removing a possible incentive for a hospital to prematurely discharge a patient from inpatient hospitalization. . . . The hospital has the responsibility to provide the necessary services before discharging the patient." The Department's additional concern is safeguarding against unnecessary services and excess payments prohibited by Minn. Stat. 256B.04, subd. 15.

The Judge finds that the Department has demonstrated the need for and reasonableness of proposed subpart 14.B. Again, the Department is attempting to balance the need for efficiency and cost containment against the potential need for the partial hospitalization of some recipients within two weeks of

discharge from inpatient services. Although the proposed "blanket" implementation of this approach may prove to be a hardship for some recipients, the rule has been shown to be rationally based, thus needed and reasonable.

17. Part 9505.03235 subp. 4.H. -- This rule provision prohibits MA reimbursement for a recipient's diagnostic assessment performed on a day during which the recipient participates in psychotherapy unless the psychotherapy is due to an emergency. The Minnesota Medical Association contends that this payment limitation is neither reasonable nor necessary because it does not take into account infrequent psychiatric visits made by physicians to "remote sites". The MMA argues that during the psychiatrist's visit to a "remote" location, assessments, diagnosis and treatment may regularly occur on the same day.

The Department states that the proposed rule does provide for emergency-type situations by allowing for one hour of psychotherapy in conjunction with a diagnostic assessment. The Department further believes that because the pool of qualified mental health professionals who are providers will increase as of September 1, 1990 (see, subparts 22 and 23). Service accessibility in "remote areas" will improve because of the increased number of qualified mental health professionals. In addition, this rule provision is in response to Minn. Stat. 256B.04, subd. 15 which prohibits medical assistance payments for duplicate or unnecessary services. The Department contends that a psychotherapy session provided on the same day as a diagnostic assessment may essentially repeat the services provided in the diagnostic assessment.

The Administrative Law Judge finds that the Department of Human Services has demonstrated the need for and reasonableness of the proposed rule with an affirmative presentation of facts.

18. Part 9505.0175, subp. 28. -- This rule provision defines the term "mental health professional" for the purpose of determining who are providers eligible for MA reimbursement. Karen Sames, Government Affairs Coordinator for the Minnesota Occupational Therapy Association and Rondell S. Berkeland, Director of the Program in Occupational Therapy at the University of Minnesota, contend that occupational therapists should be included in the definition. They assert that these professionals are qualified by virtue of their education and experience to function as mental health professionals within the meaning of the rule.

The Department states that the definition of "mental health professional" which is contained in Minn. Stat. 245.462, subd. 18 does not include an occupational therapist among those professionals qualified to receive MA

payments as mental health providers. Additionally, Minn. Stat. 256B.02, subd. 7 requires that a "vendor of medical care" be licensed and provide services within the scope of that license. Occupational therapists are not licensed by the State. Consequently, the Department does not think that it is appropriate to include occupational therapists within the meaning of mental health professional in these proposed rules. The Judge agrees and finds that the proposed rule, absent the inclusion of occupational therapist-, has been shown to be reasonable

19. Part 9505.0323, subps. 1.S., 4.1. and 21. - These rule provisions require that face-to-face interviews with recipients must be part of the



psychological testing, and diagnostic assessment process. The rule essentially prohibits diagnostic conclusions from psychological tests absent an in-person interview. The Dakota Mental Health Center, St. Paul-Ramsey Medical Center, and the Ramsey Clinic each commented in opposition to this "in-person" interview requirement. The commentors argue that mental health professionals trained in testing can satisfactorily interpret testing; that the interview requirement will only delay the process and result in more expense.

The Department states that a psychological test is relatively useless when it stands as the only evidence in a diagnostic assessment and that the most important information comes from the recipient in direct question and answer sessions with the mental health professional. The Department contends that the face-to-face interview benefits both the recipient and the mental health professional by providing an opportunity to obtain more complete and more accurate information and thus arrive at a more accurate diagnostic assessment.

The Judge finds that the need for and reasonableness of the proposed rules requiring an in-person interview to validate psychological tests has been demonstrated by the Department.

20. Part 9505.0323. subp. 1.D. -- This rule provision defines the term "clinical supervision" and requires that "The provider must be present and available on the premises more than 50% of the time in a 5 working-day period during which the supervisor is providing a mental health service." (See modification in Finding 11 above). Several individuals commented that the 50% supervision requirement is unreasonable, especially in situations where psychiatrists travel to outstate or "satellite" locations for consultative purposes. The Ramsey County Mental Health Clinic states that:

In trying to provide appropriate, cost-effective and accessible services to the serious and persistently mentally ill it is often necessary to have decentralized services, such as day treatment or supportive groups, in an in-the-community, away from the main clinic location. While supervision is available at all times and is provided regularly, it is unnecessarily burdensome to require the presence of a supervisor on-site over 50% of the time. These kinds of services do not require the presence of a supervisor in order to be of high-quality."

However, Susan C. Jenkins, MD, states that:

The proposed rule would require a psychiatrist be present 'on-site' only 50% of the time. This is inadequate for safe and effective prescribing of antipsychotic medicines. Patients on antipsychotic drugs must be examined regularly by a physician or a psychologist or counselor (adequately trained) for signs of tardive dyskinesia, akathisia, dystonia and other possibly irreversible side effects

The Department has modified the above prnvision t- somewhat relax the 50% supervisory requirement. (Added the words "in a 5 working day period A-" the

Department contends that the 50% supervisory requirement is necessary to require the provider's direct involvement in the direction and instruction of the supervises in order to insure that mental health services are properly provided to a recipient. The Department states that the 50% requirement is the same as the policy established by Blue Cross and Blue Shield of Minnesota and thus, is a standard which mental health professionals are accustomed to.

The Administrative Law Judge finds that the need for and reasonableness of the proposed 50% supervisory requirement has been shown by the Department of Human Services. The Judge points out that beginning September 1, 1990, pursuant to proposed Rule 9505.0323, subp. 23, the supervision of mental health practitioners may be provided by any person qualified as a mental health professional.

21. Part 9505.0323 subp. 15. -- This rule provision sets forth payment limitations for day treatment services. It requires that day treatment "must be provided at least one day a week for a minimum 3-hour time block." The rule does not permit splitting up the 3 hours of services into smaller segments throughout the day. Several commentators objected to the inflexibility in the rule, arguing that many recipients cannot benefit from 3 continuous hours of day treatment services. Rather, the services must be split up throughout the day to have any beneficial effect.

The Department points out that the term "day treatment services" is defined in Minn. Stat. 245.462, subd. 8 as "a structured program of intensive therapeutic and rehabilitative services at least one day a week for a minimum 3-hour time block that is provided within a group setting. Consequently, the Department argues that it is bound by the statutory definition and cannot deviate for the purpose of a more flexible approach. The Judge agrees. The Legislature has determined what are reimbursable "day treatment services" and this directive must be followed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. That the Department of Human Services gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. 14.14, and all other procedural requirements of law or rule
3. That the Department has documented its statutory authority to adopt

the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of fact; in the record within the meaning of Minn. Stat- sec. 14.14, subd. 2 and 14 50 tili

5. That the additionq ann amendmpnls to thp prnposed iule, which were suggested by the Department after publication of the proposed rules in the

State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15, subd. 3, Minn. Rule 1400.1000, Subp. I and 1400.1100.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such .

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this                      day of May, 1989.

PETER C. ERICKSON  
Administrative Law Judge